BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES T. BAGGETT Claimant VS. **B & G CONSTRUCTION** Respondent AND **COMMERCIAL UNION INSURANCE** Insurance Carrier	)	Docket No. 160,711

ORDER

ON the 7th day of April, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated February 16, 1994, came on before the Appeals Board for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Brian D. Pistotnik of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney, Edward D. Heath, Jr. of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that considered by the Special Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are the same as those set forth in the Award of the Special Administrative Law Judge.

ISSUES

The Special Administrative Law Judge found that claimant was entitled to permanent partial general disability benefits based upon a twenty percent (20%) work disability as a result of a work related injury to the low back on November 16, 1991. The Special Administrative Law Judge denied the claim for benefits for an accident occurring on December 6, 1991. The claimant has requested the Appeals Board to review those findings. The issues now before the board are:

(1) The nature and extent of disability, if any, that has occurred as a result of the accident of November 16, 1991.

(2) Whether claimant is entitled to temporary total disability benefits for the November 1991 accident.

(3) Whether claimant is entitled to vocational rehabilitation benefits for the November 1991 accident.

(4) Whether the accident of December 6, 1991 arose out of and in the course of claimant's employment.

(5) The nature and extent of disability, if any, that has occurred as a result of the December 1991 accident.

(6) Whether claimant is entitled to temporary total disability benefits, medical benefits, and vocational rehabilitation benefits for the December 1991 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds, as follows:

(1) Claimant is entitled to permanent partial general disability benefits based upon a work disability of 65.5% for the work related accident of November 16, 1991.

On or about November 16, 1991, claimant injured his low back when he was helping a co-worker lift a gable truss weighing 150 pounds or more. The accident occurred when the co-worker lost his balance and let go of his end of the rope causing the weight of the truss to be borne solely by claimant. Claimant immediately felt pain in his lower back and experienced numbness in his left leg. Claimant notified his employer shortly after the incident. The employer recommended that he obtain chiropractic treatment. At the time of this notice, claimant had already begun treatment with Wichita chiropractor Frederick P. Dopps who he first consulted on November 19, 1991.

Dr. Dopps' initial diagnosis on November 19 was left leg sciatica due to lumbar disc displacement and lumbar intersegmental dysfunction. Dr. Dopps advised the claimant he

had an acute inflamed disc and that he should take off work for several weeks to recover. As claimant advised Dr. Dopps he was unable to miss work, the doctor informed claimant that he should have lifting restrictions and that he should not bend nor stoop. Dr. Dopps formulated a treatment plan in which he would see claimant daily for the first week, then three times a week for four weeks, and then re-evaluate claimant at the end of that period. Following the evaluation on November 19, Dr. Dopps treated and examined claimant eleven additional times prior to the second accident on December 6, 1991, when he fell into an open basement and sustained severe injury.

Despite Dr. Dopps recommendations and his ongoing symptomatology, claimant continued to work for respondent until his second accident. Claimant testified that after his November accident he was experiencing significant symptomatology while at work and that he was seeing Dr. Dopps on a daily basis. Claimant testified that his back was aggravated by these work activities, that it was difficult for him to bend over and that he had to request co-workers to help lift the heavier materials. Co-worker George Vierthaler testified that during the period in question prior to the second accident claimant had difficulties walking, could not lift significant amounts, and could not straighten his back very well after bending over. Claimant's father testified that after the injury to the low back in November, his son could hardly straighten his back and would be hunched over at the end of the work day. During the period between the two accidents, claimant earned his regular wages.

The medical evidence is uncontroverted that claimant should not return to his former occupation in the construction industry as a result of his low back injury that he sustained in November 1991. Daniel D. Zimmerman, M.D., examined claimant on June 29, 1992. Regarding the findings pertaining to the low back, Dr. Zimmerman diagnosed paraspinous myofascitis affecting the left paraspinous musculature with lumbar disease at L4-L5 and L5-S1 confirmed by x-ray. X-rays of the lumbosacral spine demonstrated a slight scoliotic curve to the left, with disc space narrowing at L4-L5 and to a greater extent at L5-L1. Dr. Zimmerman also found reduced range of motion of the spine. Dr. Zimmerman utilized the AMA Guides, Third Edition, for rating purposes and believes that claimant has sustained a nine percent (9%) permanent partial impairment of function to the body as a whole as a result of his low back injury of November 1991. Based upon the back injury, Dr. Zimmerman feels that claimant should lift no more than 20 pounds on an occasional basis, 10 pounds on a frequent basis, and that he should avoid frequent bending, twisting, stooping and crawling maneuvers. Dr. Zimmerman does not believe that claimant is able to return to carpentry.

The testimony of Frederick P. Dopps, D.C., was presented in this proceeding. Dr. Dopps believes that claimant sustained a lumbar disc injury as a result of the work related accident in November 1991 and that claimant should follow the restrictions pronounced by Dr. Zimmerman. Dr. Dopps also used the AMA Guides to assess physical impairment and believes that claimant has sustained a ten percent (10%) permanent partial impairment of function to the body as a whole as a result of the back injury. Dr. Dopps also believes that claimant should not return to carpentry as a result of his back condition.

Permanent partial general disability exists when the employee is disabled in the manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, as amended. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and

capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. See K.S.A. 44-510e.

As claimant continued to work for a comparable wage between the date of accident in November 1991 and the second accidental injury of December 6, 1991, there is a presumption of no work disability pursuant to the above statute. However, after reviewing the entire record, the Appeals Board finds that presumption has been overcome. The medical evidence is uncontroverted that claimant should not return to his former occupation of carpentry. The medical evidence is also uncontroverted that claimant was working against his doctor's recommendations during that short period between accidents, a time when claimant had neither reached maximum medical recovery nor been provided final assessment by his health care providers. Therefore, claimant is entitled to permanent partial general disability benefits based upon work disability for the accident of November 16, 1991, should work disability exceed the functional impairment ratings.

Jerry D. Hardin is the sole vocational expert to testify in this proceeding. Mr. Hardin testified that claimant has completed nine years of formal education and has obtained his GED. Claimant has no other formal education or training. Claimant's work experience is limited to rough carpentry. After recuperating from his accident in December 1991, claimant has worked part time for his father who owns a video game company and earns approximately $75.00 per week. Utilizing the work restrictions and limitations indicated by Dr. Zimmerman for the back injury only, Mr. Hardin believes claimant is currently limited to work classified as sedentary and light which would not violate the restrictions against bending, twisting, stooping and crawling. Based upon his personal evaluation, Mr. Hardin believes that claimant has experienced, as a result of the low back injury, a seventy-five percent (75%) loss of his ability to perform work in the open labor market and fifty-six percent (56%) loss of his ability to earn a comparable wage. Regarding wage loss, Mr. Hardin believes that claimant retains the ability to earn approximately $200.00 per week. The parties stipulated to an average weekly wage at the time of accident of $451.15. Although claimant is only 27 years old, Mr. Hardin believes that he is going to have significant difficulty finding work because he lacks transferable skills that are generally utilized in the sedentary and light occupations.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d, 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average between the seventy-five percent (75%) loss of access and fifty-six percent (56%) loss of ability to earn a comparable wage resulting in a sixty-five and one half percent (65 1/2%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

(2) Claimant is denied temporary total disability benefits for the low back injury from January 13, 1992 through February 13, 1992. When Dr. Dopps forcibly advised claimant on January 13, 1992 that he was to be off work, claimant was already off work as a result of the injuries sustained in the accident of December 6, 1991.

(3) Based upon the evidence presented, the Appeals Board finds that claimant is entitled to a vocational rehabilitation assessment. As indicated above, claimant has limited formal education and transferable work skills. These factors, coupled with claimant's permanent restrictions and limitations, constitute a significant barrier to claimant's successful return to the labor force at a comparable wage.

A primary purpose of the Workers Compensation Act is to restore to the injured employee the ability to perform work in the open labor market and to earn comparable wages. K.S.A. 44-510g. At the time of accident, claimant's average weekly wage was $451.15. Assuming claimant is able to obtain a job earning $200.00 per week as envisioned by Mr. Hardin, there remains a fifty-six percent (56%) loss of wages. A vocational rehabilitation assessment may provide information whether that loss may be reduced by an appropriate vocational rehabilitation plan. Therefore, this case should be remanded to the Administrative Law Judge with directions to enter an order for vocational rehabilitation assessment.

(4) The Special Administrative Law Judge found that the accident sustained by claimant on December 6, 1991 did not arise out of claimant's employment. The Appeals Board disagrees and finds the incident is compensable and claimant is entitled to permanent partial general disability benefits based upon the impairment of function rating for the head and shoulder injuries as provided by Dr. Zimmerman.

On December 6, 1991, claimant, while on the job site and while performing his job duties, was assaulted by a co-worker. Immediately prior to lunch time, a co-worker approached claimant to demand the return of $3.00 that claimant had previously borrowed. The co-worker struck claimant from behind. When claimant turned to face his attacker, he stepped backwards into an open basement and fell sustaining serious head injury and a fractured right clavicle.

At first glance, it would appear that analysis of this incident would be governed by previous appellant decisions dealing with assaults by co-workers. There exists authority that assaults by co-workers are not compensable unless the assault arises from a matter directly related with the employment. However, in the situation at hand the claimant was at an increased risk due to the work environment when he was attacked. Where a personal or non-work-related risk combines with increased risks from the employment activity, an incident is compensable. See Bennett v. Wichita Fence Company, 16 Kan. App. 2d 458, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992), where the Court of Appeals held that where an injury is clearly attributable to a personal condition of the employee and no other factors intervene to cause or contribute to the injury, no compensation award is allowed; but where the injury is the result of the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed. In Bennett, claimant was sent by his employer in a company vehicle to make a delivery. On his return trip, Bennett suffered an epileptic seizure, blacked out, and hit a tree. The Court of Appeals found the accident compensable, because the act of driving constituted additional risk and provided the necessary causal connection between the injury and employment. Therefore, the accident arose out of claimant's employment.

In the case now at hand, the Appeals Board finds that claimant's head and shoulder injuries are the result of the concurrence of the attack upon claimant and the dangers present on the work site, i.e., the open basement into which claimant fell. The attack by the co-worker did not cause the severe injuries suffered by claimant as they were caused

by claimant's fall into the basement when he was stepping backwards to analyze the situation. It is true the fall would not have occurred but for the attack; however, it is also true the claimant would not have sustained the severe head and shoulder injuries but for the increased risk related to the job site.

(5) Claimant is entitled to permanent partial general disability benefits based upon the fifteen percent (15%) impairment of function rating provided by Dr. Zimmerman for the injuries to the head and right shoulder. Claimant does not argue or contend that work disability is appropriate under the facts presented, and as it is not made an issue pertaining to the December accident, it is not addressed.

The fifteen percent (15%) impairment of function rating provided by Dr. Zimmerman is uncontroverted. As a result of the fall into the basement, the claimant fractured his right clavicle, and sustained a severe head injury causing him to be in a coma for twelve days. The claimant was hospitalized for several weeks and went through speech therapy, occupational therapy, physical therapy, and made a gradual recovery from his injuries. The claimant continues to have difficulty with his memory and occasionally experiences a buzzing sensation. Dr. Zimmerman rated the claimant as having a five percent (5%) whole body permanent functional impairment as a result of the residuals of the head injury. As a result of the clavicle fracture, the claimant has reduced range of motion and reduced strength in his shoulder. Dr. Zimmerman believes the clavicle fracture healed misaligned. Using the AMA Guides, Third Edition, Revised to evaluate physical impairment, Dr. Zimmerman believes that claimant has experienced an eighteen percent (18%) permanent functional impairment to the right upper extremity which converts to an eleven percent (11%) whole body rating. Combining the head and shoulder injuries, Dr. Zimmerman believes claimant has experienced fifteen percent (15%) impairment of function to the body as a whole. Also, as a result of the shoulder injury, Dr. Zimmerman believes that claimant should not lift more than twenty pounds on an occasional basis and ten pounds on a frequent basis and should avoid work activity with the right upper extremity at shoulder height or above. One of claimant's treating physicians, Jane K. Drazek, M.D., testified that she agreed with these restrictions and limitations assuming that claimant continues with pain or disability in the shoulder. When asked whether she believed claimant had a permanent disability because of the head injury, Dr. Drazek replied that she could not answer that question having just seen claimant two months after his dismissal. Dr. Drazek testified that problems from a head injury can be long standing and they can take a long time to resolve, but that she would certainly recommend follow-up testing as claimant had higher level cognitive problems at their last meeting.

(6) Claimant is entitled to temporary total disability benefits for the period of December 6, 1991 through March 2, 1992 when Dr. Drazek released claimant to return to work for the work related accident of December 6, 1991.

Further, the Appeals Board finds that claimant is entitled to medical benefits for the injuries sustained in the fall of December 6, 1991. This includes all reasonable medical treatment incurred to date, and future medical care and treatment upon proper application to the Director.

Claimant's request for vocational rehabilitation assessment in connection with the December 1991 accident is moot at this time as that is ordered in connection with the accidental injury of November 16, 1991.

AWARD

WHEREFORE, it is finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 16, 1994, is modified in the respect that claimant is entitled to permanent partial disability benefits for an accidental injury arising out and in the course of his employment on November 16, 1991, based upon an average weekly wage of $451.15 for 415 weeks of permanent partial disability of 65.5% at the rate of $197.01 per week in the sum of $81,759.15, and for an accidental injury which occurred on December 6, 1991 based on a 15% functional impairment rating and average weekly wage of $451.15 for 12.57 weeks of temporary total at the rate of $289.00 per week in the sum of $3,632.73, and 402.43 weeks of permanent partial disability at the rate of $45.12 per week in the sum of $18,157.64; that this case is remanded to Administrative Law Judge Nelsonna Potts Barnes to enter an order providing for vocational rehabilitation assessment and for such additional proceedings as the parties may require.

Pertaining to the accident of November 16, 1991, as of August 19,1994, 144 weeks of permanent partial disability at $197.01 per week in the sum of $28,369.44 is due and owing. The remaining 271 weeks are to be paid at $197.01 per week until fully paid or until further order of the Director.

Pertaining to the accident of December 6, 1991, as of August 19, 1994 there is due and owing claimant 12.57 week of temporary total benefits at the rate of $289.00 per week for a sum of $3,632.73 and 128.57 weeks of permanent partial disability at $45.12 per week in the sum of $5,801.08, for a total of $9,433.81 to be paid in one lump sum. The remaining 273.86 weeks is to be paid at the rate of $45.12 per week until fully paid or until further order of the Director.

The remaining orders of the Special Administrative Law Judge as contained in his Award of February 16, 1994, are adopted by the Appeals Board and incorporated herein by reference as if fully set forth.

IT IS SO ORDERED.

Dated this _____ day of September, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully dissent from that portion of the majority opinion finding claimant's injury of December 6, 1991 to be compensable. The intent and purpose of the Kansas Workers Compensation Act is to compensate claimant's for injuries which arise out and in the course of their employment. The majority, in citing Bennett v. Wichita Fence Company as justification for this award, expand the increased risk doctrine to levels not contemplated by the Appeals Court. Bennett required an injury resulting from the concurrence of a pre-existing idiopathic condition and a hazard of employment in order for compensation to be allowed. To find that Bennett applies to these circumstances is to make any non work related fisticuffs at a construction site potentially compensable. In this matter no such idiopathic condition exists. Instead a confrontation between co-employees, clearly non-work related is made work related by the Appeals Board unjustified expansion of the Bennett philosophy.

Kansas courts have long held that an injury sustained by assault arises out of employment when it arises out of the nature, conditions, obligations and incidents of the employment in the same manner as any other injury. In Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, (1985), the court found a fight between co-employees to be compensable because the fight evolved around who among the two combatants had the right to drive a particular truck from Goodland to Kansas City. The dispute was over company policy among drivers. In this instance there is no dispute that the fight was personal between the assailant and the claimant regarding money owed to the assailant by the claimant.

Additional support for a denial of benefits in this case is found in other jurisdictions. In Penny v. Anaconda Company, 632 P.2d 1114 (Montana 1981), the Workers Compensation court found that a fight between two employers resulted only from personal animosity and was not work related. The mere fact that employees are involved does not make a fight and the resulting injury work related. See also Willis v. Taylor and Fenn Company, 137 Conn. 626 (1951). In Cahala v. OK Tire Store, 112 Idaho 1020 (1987), the court found that a work place fight was a result of personal animosity and not related to work. Benefits were denied.

While it is accepted that the incident between claimant and the aggressor occurred during the course of employment as it did occur on the employment grounds between the hours the claimant normally worked, I dispute the majority finding that claimant's injury arose out his employment as the causal connection between the accidental injury and the employment has not been proven.

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